BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE EFFECT OF PRESUMPTION OF DEATH UPON MARKETABILITY OF TITLE TO REAL ESTATE. — It is an elementary rule of equity that an unwilling purchaser will not be forced to take a doubtful title. He cannot, however, demand a title absolutely free from suspicion, for in the nature of things a mathematically certain title is an impossibility.[1] The test is not whether the title is free from all doubt, but whether it is free from reasonable doubt.

An interesting phase of this subject is presented in cases where the state of the title depends on the death intestate and without issue of a person who has been absent and unheard of for a long time. In a recent article Mr. W. F. Meier has collected the authorities on this point.[2] *The Effect of Presumption of Death upon Marketability of Title to Real Estate*, 19 Green Bag 713 (December, 1907). From a review of the cases the author reaches the following conclusions: (1) "Mere absence from home without tidings . . . is not sufficient to render marketable the title to property in which the absent one, or his lawful issue, may have an interest. (2) Absence for a long period of years . . . coupled with corroborative evidence pointing to a strong probability of actual death, will remove the cloud sufficiently to allow the enforcement of specific performance. (3) The disappearance and absence of a person, unmarried, under such circumstances as to warrant a finding for specific performance, will also raise a presumption of death without marriage and without lawful issue."

The results reached by Mr. Meier seem sound. But when we accept them we are necessarily led to the further conclusion that the presumption of death as such has absolutely no effect on the marketability of title. As Mr. Meier says, "when a person has been absent from his home or residence, and has not been heard from by his friends and relatives for seven years, there arises a presumption of death." This presumption is rebuttable, but if no evidence is given for that purpose it must be sustained by the court or jury.[3] If, then, "mere absence" for seven years when no evidence is offered to rebut the presumption of death is not enough to warrant the court in forcing title on a purchaser, it cannot be said that the presumption, as such, is given any effect. This fact is made still clearer when we require the absence, though long enough to raise the presumption of death, to be "coupled with corroborative evidence pointing to a strong probability of actual death."

Furthermore, in most of the cases of this kind in which the marketability of title comes in question the court must feel sure to a moral certainty, not only that the absent party is dead, but also that he has not made a will or married and left issue. If he was unmarried when last heard of, the legal presumption, corresponding to the presumption of death, is that he died without legal issue.[4] Few of the cases expressly consider how either of the difficulties suggested should be met when they arise in the present connection. But it will be noted that in practically all the cases in which specific performance is decreed against the vendee, there are circumstances that tend strongly to show that the absentee died within a short time after his disappearance, and therefore the possibility of his having married and left issue is very remote.[5] Similarly, the fact that no one has appeared claiming under a will of the decedent although many years have elapsed since he disappeared, coupled with the further fact that he probably

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[1] See Lyddall *v.* Weston, 2 Atk. 19.

[2] See also Maupin, Marketable Title, 2 ed., 746 n.

[3] Biegler *v.* Supreme Council, 57 Mo. App. 419.

[4] Shown *v.* McMackin, 9 Lea (Tenn.) 601.

[5] Cambrelleng *v.* Purton, 125 N. Y. 610; Ferry *v.* Sampson, 112 N. Y. 415; Bowditch *v.* Jordan, 131 Mass. 321.

died a short time after he was last heard of, is sufficient to convince the courts of intestacy. The result, then, seems to be that the courts in fact give no weight to either of the presumptions as such, but apply the general rule that the title must be free from reasonable doubt, and to this end they require that the circumstances be such as to show beyond a reasonable doubt that the absentee has died intestate and without legal issue.

TITLE BY DEVOLUTION OF POSSESSORY RIGHTS. — That much of the learning concerning the history and development of our laws of property and much of the speculation upon the nature of title and possession are not only of interest to the antiquarian and the philosopher but are of practical value to the modern lawyer, is well illustrated by a recent article. *Title by Devolution of Possessory Rights*, Anon., 17 Madras L. J. 297 (August, 1907). The article is a review of the principles involved in a recent Indian decision [1] in which it was held — apparently for the first time — that the heir of a disseisor cannot recover possession from a trespasser who enters upon the land after the death of the ancestor and before the entry of the heir. This decision the author believes to be erroneous and contrary to the fundamental principles of English law. "Possession," he says, "is protected not merely as a fact, . . . or as an imperfect title in the course of ripening into ownership by the operation of the law of prescription, but as a substantive right or interest by itself." The ancestor in the present case, therefore, acquired a substantive right in the land which gave to his heir, without any possession of his own, a right good against all the world except the true owner.

In this conclusion the learned author seems eminently sound. The protection afforded the possession of a disseisor, even against the true owner, was fundamental in our law and forms a large chapter in its history.[2] This protection applied both to land and to chattels,[3] and we can find traces of it in the doctrines of discontinuance and descent cast.[4] A possession that was so protected was not merely a physical fact but a recognized legal right. This point was still more noticeable in dealings between third persons and the disseisor; for the latter had a right transferable, devisable, giving dower and curtesy, and subject to execution and escheat.[5] Furthermore, his title was good against all but the disseisee, and when that one outstanding right became extinguished absolute ownership resulted. Hence the common law doctrine was a doctrine of relative ownership. If A, B, and C successively take X's land, C may be said to be the owner, subject only to the outstanding rights of A, B, and X. When those outstanding rights are extinguished, C becomes the absolute owner.

Modern cases accord with this conception of possession and title. The adverse possessor can maintain ejectment against all but the disseisee or any one claiming under him.[6] One who has adverse possession for ten years acquires such an interest that when the sovereign takes the land by eminent domain, his executors may require the land to be valued with a view to compensation.[7] It may be urged that in these cases the law gives a remedy in the nature of a tort action for interference with possession and not a proprietary remedy. As the author points out, if this were true, the heritable or devisable character of a possessory right, as shown in history, would be an illusion. For if the heir has entered into possession, all redress can be secured on the strength of that possession and no question of the heritable character of such right would ever arise. Has the common law changed today? The American cases which hold that the statute of limitations will not run against successive

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[1] Shi Gopal *v.* Ayesha Begam, [1906] I. L. R. 29 All 52.
[2] Pollock and Maitland, History of English Law, B. II, c. IV.
[3] 3 HARV. L. REV. 23.
[4] 4 L. Quar. Rev. 286.
[5] 2 L. Quar. Rev. 481, 488.
[6] Asher *v.* Whitlock, L. R. 1 Q. B. 1.
[7] Perry *v.* Clissold, [1907] A. C. 73. See 20 HARV. L. REV. 563.